79-6898

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. 894/77

JOHN L. GRADY et al., and FATIMA GRADY,

Appellants,

— v —

RODERICK A. McLEAN, M.D.,

Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

JOHN L. GRADY
Appellant Pro Se
P.O. Box 27
Elmwood Station
Syracuse, New York 13207

DATE: June 25, 1980.

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In The

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No. 894/77

JOHN L. GRADY et al., and FATIMA GRADY,

Appellants Pro Se,

— v —

RODERICK A. McLEAN, M.D.,

Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

In Court Of First Instance:

New York Supreme Court, Onondaga County, Special Term, Syracuse, New York. S.C. Justice John R. Tenney in his letter said: I see no basis for vacating my previous order (dated 6-13-77), and the motion to modify or vacate is denied. (Reviewable Record, p. 22)

At trial, S.C. Justice Edward F. McLaughlin in his letter dated July 14, 1977 (Reviewable Record, p. 53), to Judge Tenney, said: He was holding several motions made by plaintiffs and defendant, one of which must be referred to Judge Tenney, which was a motion to vacate Judge Tenney's order,

allowing late service of an answer by defendant, since any motion to modify or vacate an order must be heard by the judge who issued it.

In The State Court of Appeals:

The Clerk of the Court in his letter dated May 15, 1980 said: that CPLR 5514(a), provided an automatic extension of time within which to take an appeal as of right, when a motion for leave to appeal has been denied. Presuming the order appealed from, is in fact an appealable order within the meaning of CPLR 5601. That Appellants' motion for such extension is therefore a nullity upon which no further action will be taken.

GROUNDS INVOKING JURISDICTION

Inherent in the concept of due process of law, as contained in the Fifth and Fourteenth Amendments, is the requirement that all legislation be reasonable, for the means selected. But the legislative foundation upon which state statute CPLR Sec. 5601(b) 1 rests has no real substantial relation to the purpose it seeks to be accomplished. However, Appellants are forced to forgo their privilege of direct appeal, on a question as to the validity of N. Y. State Statute CPLR 5601(b) 1; as being repugnant to the Constitution, or that it stood as an obstacle to the full objectives of Congress. Instead; in order to bring all the questions before the Court. (*Williams* v. *Mayor and City of Baltimore*, 1933, 53 S.Ct. 431, 289 U.S. 36, 77 L.Ed. 1015). The Supremacy Clause is sufficient basis on which to rest Supreme Court jurisdiction over state Court decisions.

Whereupon, the First Congress, in the famous section 25 of the Judiciary Act of 1789, authorized review of state Court decisions, as herein is involved a "federal question". See Act of Sept. 24, 1789, Sec. 25, 1 Stat. 73, 85. Sec. 28 U.S.C.A. Sec. 2103, as amended, Act of Sept. 19, 1962, Pub. L. 87-669, Sec. 1, 76 Stat. 556.

Exceptional Circumstances:

Court of Appeal's construction of the state's constitution on federal question presented as: Excess in abuse of state Court's jurisdiction, was determinable on both state and federal grounds of the Constitution. (*People ex rel Ryan* v. *Lynch*, 1933, 262 N.Y. 1, 86 N.E. 28), after State Court of Appeals has previously decided the federal issue, holding that no appeal lie. The Court recognizes three exceptions to the final judgment in this case: Further proceedings were had, and the federal claim was ruled invalid at pleading stage. Where federal issue has been decided by the highest state court, the issue survives, and requires federal review *regardless* of outcome of further proceedings. State Appeals Court decided against the federal claim, but the case was remanded, without trial on the merits, and Plaintiffs lost. State Court will not permit Appellants to again raise federal claim for review. (*Cox Broadcasting Corp.* v. *Cohn*, 43 L. Ed.2d 328, 1975). (See Exhibit p. 37 — Appellants' Cross Motion showing further presentation of the Federal Question at the Appellate Division level, served 9-13-77).

Now the granting or denial of relief depends directly and ultimately upon the construction of the Constitution. Where Appellants have been injured by the acts in abuse as above shown.

THE NATURE AND STATUTES OF THE PROCEEDING

Excess in abuse of jurisdiction fairly comprises all federal issue involved which was brought pursuant to Federal Statutes: Article III, Section 2.; Article IV, Section 2., Amendments 5 and 14.

Jurisdiction to review this case is conferred by Title 28, United States Code, Section 1257 1.).

PRIOR PROCEEDINGS AND ORDERS SOUGHT FOR REVIEW

Order from U.S. Court of Appeals, 2nd Cir., entered 11-11-76.

Special Term - Exparte Order to Show Cause, dated 6-1-77, Not entered*/

Special Term — Order, dated 6-13-77, entered 6-16-77 (Reviewable Record, p. 22).

Special Term Memorandum Decision & Order, dated 7-14-77, entered 7-21-77 (Reviewable Record, p. 28).

Appeal to Appellate Division, Fourth Dept., dated 7-18-77, served 7-18-77 (Reviewable Record, p. 30).

Special Term Order, dated 8-8-77, entered 8-11-77 (Reviewable Record, p. 31).

Appeal to Appellate Division, Fourth Dept., dated 8-29-77, served 8-29-77 (Reviewable Record, p. 33).

Appellate Division Order, dated 9-23-77, entered 9-23-77 (Reviewable Record, p. 38).

Appeal to Court of Appeals, dated 9-28-77, served 9-28-77 (Reviewable Record, p. 39).

Court of Appeals Order, dated 11-21-77, entered 11-21-77 (Reviewable Record, p. 44).

Special Term Order, dated 10-5-77, entered (Reviewable Record, p. 40).

Appeal to Appellate Division, Fourth Dept., dated 10-31-77, served 10-31-77 (Reviewable Record, p. 43).

Appellate Division Order, dated 4-14-78, entered 4-14-78 (Reviewable Record, p. 45).

Appeal to Court of Appeals, dated 4-20-78, entered 4-20-78 (Reviewable Record, p. 46).

Court of Appeals Order, dated 6-13-78, entered 6-13-78 (Reviewable Record, p. 48).

Note: */ Exparte Order retained by Judge John R. Tenney, who refused to return same and other papers to plaintiffs.

Court of Appeals Order, dated 4-29-80, entered 4-29-80 (Printed infra at p. A8).

Appeal By Leave By Court Of Appeals, dated 4-9-80, entered 4-9-80 (Printed infra at p. A11).

Appellate Division Order Denying Leave to Appeal to Court of Appeals, dated 3-28-80, entered 3-28-80, From Order of Affirmance (Stipulated Record, p. A1).

Appellate Division Order Affirming Special Term Order and Judgment on the Merits Dismissing Plaintiff's Complaint on the Merits, dated 1-11-80, entered 1-11-80 (Stipulated Record, p. A2).

Appeal to Court of Appeals by Leave of Appellate Division Denied by Appellate Division, dated 2-4-80, entered 2-4-80, From Order Affirming (see in Record to State Court of Appeals).

Special Term Order and Final Judgment Granted on Summary Judgment Dismissing Plaintiff's Complaint on the Merits, dated 5-21-79, and 5-23-79, respectfully entered 5-22-79 and 5-23-79 (Stipulated Record, pp. A10 and A12).

QUESTIONS PRESENTED

(1) At Court of First Instance. Special Term. Appellants were denied notice of Defendant's motion and affidavit of application, upon which the motion was made exparte. It was not filed in the record as required by state law and federal law, and no good cause was shown.

The federal question at that stage was: Denial of notice and hearing, which was raised by pleadings as; assignment of error to charge Defendant with default in pleading, by omission, neglect or failure to take steps required in progress of this cause.

Was not federal question substantially shown to be that Defendant's act in dispensing with judicial notice and default in pleading, was in violation of Appellant's procedural safeguards,

which have more than a deminimis impact on Appellants' Constitutional rights to due process of law?

(2) If the highest state Court where a decision to review could have been had, but refused to review. When it had previously decided the federal claim, and upon further proceedings, Plaintiffs suffered a judgment against them on the merits, dismissing their complaint as not having a cause of action. Did not lower Court's turn of refusal to amend prior appeal for permission, to serve a direct appeal as of right on Constitutional grounds, amount to a rejection of the federal claim involved, that said rejection was not an adequate independent non-federal ground to support the final denial, or judgment previously affirmed by this Court of Last Resort?

(3) Did not appeal lie either directly or by permission currently, to either State Court of Appeals, or to the U.S. Supreme Court, where the case involves a question. Whether Judgment is the result of due process?

(3) The federal question charged as: Excess in abuse of State Court's jurisdiction. Is lengthy on the facts, requiring plenary proof on the merits, with or without oral argument. But where prejudicial errors, withholding evidence, refusing to hear or act as requested, perjury, colusion of judges with attorneys. Generally, a departure from regular judicial practice for reasons other than a conviction of the cause, has resulted. If shown! And it's not legally possible for any showing on nonfederal grounds, to sustain the judgment. Should not such plenary review be had, which can give these additional reasons for resolution of this federal claim?

(4) Where Appellants have been injured by acts in excess of lower court's jurisdiction, the federal claim causing Appellants to be overly cautious in appealing, and the Last Court of Resort refused to review or amend the appeal. After further proceedings, Appellants' had a judgment to be granted against them on the merits, without regress. And now only the granting or denial of relief depends directly and ultimately upon the construction

of the Constitution. Does not this case now arise under the Constitution, Article III, Sec. 2. par. 1. Should not federal review be had, regardless of the outcome of the further proceedings, and this Court resolve the federal claim as to Defendant's default, which substantially became the federal issue?

STATEMENT OF THE CASE

Defendant's default was first raised in Federal District Court, N.D. of N.Y., Utica, N.Y., filed February 23, 1976. Civil Action 76 CV 58. Defendant nor his attorney appeared at trial on April 26, 1976, giving no excuse. On April 30, 1976, Plaintiffs filed a default affidavit on application to that Court. See Reviewable Record, p. 67. The application was never heard. On or after April 14, 1976, Plaintiffs received Defendant's notice of appearance, dated 4-14-76, on motion to Dismiss for lack of subject matter jurisdiction. See Reviewable Record, p. 66. At hearing on May 10, 1976, the Complaint was dismissed for lack of subject matter jurisdiction.

On appeal to the U.S. Court of Appeals, Second Circuit, the action was dismissed for the same reason. See Exhibit 11-11-76, infra at p. A1 as annexed. Now the Court is called on to resolve this federal question, which the state Courts refused to review and avoided, giving only presumptious reasons irrebuttable.

The federal question was further presented at Court of First Instance as: Excess in abuse of jurisdiction. Fairly comprising all federal issue matter affecting the judgment appealed from.

The initial federal question raised, namely: "Was Judgment Without Notice" raised by assignment of error on request to charge Defendant's default in pleading, made returnable at trial on 6-27-77, by Appellants' Motions served 6-7-77, Reviewable Record, p. 21; 6-17-77, Reviewable Record, p. 24; 6-20-77, Reviewable Record, p. 25; 6-23-77, Reviewable Record, p. 27, Exhibit "AA".

When defects in service of Defendant's Answers were challenged, and Appellants served the default affidavit. Where the Amended Complaint was verified, the answer must also be verified, wherein the Defendant was charged with any fraud whatever affecting Appellants' rights. See CPLR 3020(b)(c); FRCP 56(e)(g); (*Federal Schools* v. *Saponaro*, 1941, 25 N.Y.S.2d 313); also (*Application of Bingemann*, 1961, 28 Misc.2d 595, 215 N.Y.S.2d 557).

Defendant by State law could not serve two answers; but did, simultaneously. See CPLR 3011. His first answer, dated 1-31-77, was unverified. His second was amended without court leave; but did supersede his unverified answer. *But was not timely served.* See CPLR 3024(c); C.P.A. Sec. 263; C.P.A. Sec. 260. Such was his default in pleading.

The Court was entitled to an answer showing issues. (*Brooklyn Trust Co.* v. *Wheeler*, 1948, 81 N.Y.S.2d 762); also (*Walsh* v. *Gray*, 214 A.D. 296, 212 N.Y.S. 230). Upon return of the defective answer, it further triggered the defense to seek an exparte order, bringing on the further Constitutional violations under the due process clause, and a flood of federal questions.

A state Court of first instance, Special Term, Judge John R. Tenney granted Appellee an exparte Show Cause Order, dated 6-1-77, which was retained by that Judge. This Court is called on to grant an order compelling discovery of all papers retained by Judge Tenney, and especially the Show Cause Order dated 6-1-77, and upon the opposing attorney if necessary, pursuant to FRCP Rule 37.

The affidavit of application upon which the exparte motion was made, was not served upon Appellants, neither was it filed in the record, as required by state law, and federal law. See R.C.P. 88; C.P.A. Sec. 98; CPLR 215; ERCP (6)(d); Also Ruling Case Law Summaries several decisions of the Supreme Court, 21 R.C.L. 1262. "Matter of Galvin's Estate 153, Misc. 11, 274 N.Y. Supp. 846 (1934); also (*Duby* v. *Martin*, 109

N.Y.S. 2d 503 (1951); also (*Powell* v. *Schoellkopf*, 197, App. Div. 471, 188 N.Y. Supp. 297 (4th Dep't. 1921).

Afterwards, Special Term orders, dated 6-13-77, 8-8-77, flowed characteristically from that exparte motion, according to CPLR 5704(a); and Case Law: (*Application of Scotti*, 1976, 53 A.D.2d 282, 385 N.Y.S. 2d 659). Proper procedure for relief, was to request Special Term court to vacate the exparte orders, and thereafter, if denied, to appeal to the Appellate Division from the order of denial. This was done. See Reviewable Record, pp. 27, 33, 38, 39. Also (*In re Wilmark Service System, Inc.*, 1964, 21 A.D.2d 478, 251 N.Y.S.2d 267).

Thereupon, the state Court of first instance at Special Term, now was the last and highest state court where review was, and could be had. The Appellate Division, Fourth Department also refused to review, giving no opinion, but affirming on the merits. Now the final judgment is not subject to any further review by any state court, and the highest State Court of Appeals, where review could have been had, has turned on the federal question, and issue. Therefore, its designation given the final judgment is not controlling. Where prior decisions has been rendered on the federal claim. (*Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 72). State law can do no more than reveal the incidents and effects the final judgment, and judgments in its local context.

At trial on 6-27-77, day of return, Judge Edward F. McLaughlin granted Defendant an Order, dated 7-21-77, following his memorandum Decision, dated 7-14-77. See Reviewable Record, pp. 28, 29. Where shown Appellants' appeal from the Decision and Order. Also see Reviewable Record, p. 30, dated 7-18-77.

When the defense attorney and the trial judge, had knowledge of Plaintiffs' application for default judgment/or inquest. But such hearing was set aside without good cause shown. Such act on the part of the Court was prejudicial error, affecting Appellants' Constitutional rights under the due process clause,

and in violation of federal law. See FRCP 55(2)(c); FRCP 54 (c). Good cause was not shown.

Where Defendant's Opposing Affidavit, dated 7-22-77, Reviewable Record, p. 26, presented at trial, but was withheld from the record, and it failed to state that Defendant's default, was due to mistake, inadvertence, surprise, or excusable neglect. Then the proper procedure was for Defendant to ask that the default be opened, or otherwise default judgment be granted to Appellants, but not set aside. (*Bennet* v. *Dorothy Lamour, Inc.*, 1961, 13 A.D.2d 816, 216 N.Y.S.2d 306). Also (*U.S.* v. *Topeka Livestock Auction, Inc. D.C. Ind.*, 1975, 392 F. Supp. 944). Also CPLR 2221(a)(1)(2); CPLR 5015(a).

When trial court made an order, dated 7-21-77, Reviewable Record, p. 29. Compelling further pretrial procedures. But no basis was formed for leave of said order for a physical examination of Plaintiff-Patient, and the issues between parties were changed by the Court on its own. The Court erred substantially, and also by its advisement to the defense attorney, to ask for said examination, when no such request was made in Defendant's Cross Motion, dated 6-17-77. See Reviewable Record, p. 23. Wherein, the sole request made, was for hospital authorizations of Plaintiff's treating physicians, and said authorizations would have been agreed to by Appellants, without resort to leave for Court Order. By Defendant's service of a proper Notice, but not as: See Reviewable Record, p. 51a, also Brief and Appendix of Plaintiffs-Appellants to Court of Appeals, page A-24. Such notice necessitated change, by said order, dated 7-21-77, Reviewable Record, p. 29. The Court Order was further defective in subject jurisdiction, for the Defendant Doctor *did not*! serve notice pursuant to CPLR 3121, through his attorney as claimed. See Reviewable Record, p. 28.

The balance of the case centers, around the completeness of the record on appeal to Appellate Division, Fourth Department, who unanimously affirmed, or dismissed any appeal, or denied each motion. See Reviewable Record, p. 45; Also in

Brief and Appendix to State Court of Appeals, see pages A-1 and A-2; Exhibit "A2" — Page A-19; Exhibits A1, "G" and "G2" on pages A27 thru A29.

When Judge John R. Tenney constantly refused to settle the record on motions made by Appellants, and its shown, that he did render a decision on the motions involving the federal question, yet the motions were not in the record. After the Appellants' entire pleadings, which had not been copied, was left in the protection of the Trial Judge to take home to study, at the Court's request. But upon return of the pleadings by mail service, three of the Plaintiff's motions were absent from the folder, and had to be copied from the County Clerk's office for appeal, and then attached to the briefs. See Reviewable Record, p. 56.

There should be no question as to whether such practice was excessive in abuse of jurisdiction. The record was insufficient for intelligent review, which was not ordered corrected by court of first instance nor on appeal. See Brief and Appendix, of Plaintiffs-Appellants to State Court of Appeals page 6, POINT ONE; Also Exhibits pp. 32, 34, 35, 40, 43 and 43a. See (*In E.P. Reynolds, Inc.* v. *Nager Electric Company*, 1966, 17 N.Y.S.2d 51, 268 N.Y.S.2d 15, 215 N.E. 2d 339); (21 A.D. 2d 1025, 194 N.Y.S.2d 111 1); (*Monticello Mut. Building & Loan Ass'n* v. *Rapp*, 1932, 235 A.D. 304, 256 N.Y.S. 909); also (*People* v. *Foote*, 1934, 241 A.D. 846, 271 N.Y.S. 681).

Cases Further Sustaining Jurisdiction:

Goss v. *Lopez*, 42 L.Ed.2d 725, 1975;
Johnson v. *Risk*, 137, U.S. 300, 307;
Lawrence v. *State Tax Commission*, 286 U.S. 276, 282;
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 1954, 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed. 583;
Murdock v. *City of Michigan*, 20 Wall, 590, 1875;
New Orleans Waterworks v. *La. Sugar Refining Co.*, 125 U.S. 18, 1888;

Osborn v. *Bank of United States*, 1824, 9 Wheat, 738, 823, 6 L.Ed. 204;

Siler v. *Louisville & Nashville R. Co.*, 1909, 29 S.Ct. 451, 213 U.S. 175, 53 L.Ed. 753-29 S.Ct. at 454, 213 U.S. at 191 and Siler Rule 53 S. Ct. at 589, 289 U.S. at 245-246;

South Carolina Elec. & Gas Co. v. *Flemming*, 1956, 76 S.Ct. 692, 351 U.S. 901, 100 L.Ed. 1439;

Stanley v. *Illinois*, 405 U.S. 645, 1972;

Valz v. *Sheephead Bay Bungalow Corporation*, 1928, 249 NY 122, 163 N.E. 124, certiorari denied 49 S. Ct. 82, 278 U.S. 647, 73 L. Ed. 560.

Miscellaneous Opinion:

Cohen and Karger, Powers of the New York State Court of Appeals, p. 250 (rev., ed., 1952).

RULE 33 PART VIII

Pursuant to Rule 33 Part VIII, 2b, 28 U.S.C. Section 2403, it may be applicable, wherein the constitutionality of Acts of Congress affecting public interest is drawn in question and the United States nor any agency, officer or employee thereof is not a party.

To Appellants' knowledge, no court has pursuant to 28 U.S.C. Section 2403 certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

Dated: June 25, 1980.

Respectfully submitted,

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Elmwood Station
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APPENDIX

ORDER FROM UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, entered 11-11-76.

[Exhibit Page A-11-11-76]

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of November, one thousand nine hundred and seventy-six.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS,

Circuit Judges.

John L. Grady & Fatima Grady, Plaintiffs-Appellants	)	
v.	)	76-7298
Dr. Roderick A. McLean, Defendant-Appellee.	)	

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued pro se.

ORDER FROM UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, entered 11-11-76.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

We cannot agree that the Food, Drug and Cosmetic Act, 21 U.S.C. §301 et seq., confers upon an injured patient a right of action against a doctor who disregards the directions on the label of an FDA approved drug. The Act, which primarily regulates the introduction of food and drugs into interstate commerce, has an underlying philosophy of disclosure. Since information concerning drugs often cannot be made immediately intelligible to the patient, the Administration recognizes the important role of the physician in providing this intelligence to his patients. The essential purpose of labeling, therefore, is not to impose a standard of care on the doctor, but to make available "a balanced discussion of the effectiveness and the risks attendant upon the use of oral contraceptives..." 21 C.F.R. §310.50(a)(3).

We are, in addition, mindful that the doctor-patient relationship is a highly sensitive one, and traditionally a matter of state concern. It cannot be lightly inferred that Congress intended to invade it in enacting the Food, Drug and Cosmetic Act. Cf. Cort v. Ash, 422 U.S. 66, 84 (1975). We do not find any valid reason for holding possible state malpractice claims preempted by this federal legislation.

Since we fail to discern any basis for federal subject matter jurisdiction, we affirm. We believe that Mr. and Mrs. Grady would be well advised to seek

the aid of counsel as Judge Port suggested, for there still remains for consideration whether a state court action would be timely or appropriate.

s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN

s/ J. JOSEPH SMITH
J. JOSEPH SMITH

s/ WILLIAM H. TIMBERS
WILLIAM H. TIMBERS

United States Court of Appeals
FILED
NOV 11 1976
A. Daniel Fusaro, Clerk
Second Circuit

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT FROM FINAL JUDGMENT, Received on 6-3-80 at State Court of Appeals, Albany, New York.

JOHN L. GRADY et., and FATIMA GRADY Appellants Pro se	Civil Action
- v - RODERICK A. McLEAN, M.D., Appellee	Joint Notice of Appeal Index No. 894/77

Notice is hereby given that John L. Grady and Fatima Grady, Appellants Pro se in the above entitled action. Hereby appeal to the Supreme Court of the United States, from a Final Judgement in the New York State Court of Appeals.

Said Order is entered in the office of the Clerk, Court of Appeals Hall in the City of Albany on the twenty-ninth day of April A. D. 1980. Denying permission to appeal to the Court of Appeals, and denying an amendment for extension of time to appeal as of right under state statute CPLR 5601(b) 1., where a U. S. Constitutional question is involved.

Appeal to this Court is taken under Article 3, Section 2, par. 1., and pursuant to the 5th, and 14th, Amendments Section 1., as pertains to Due Process of Law, Article 6, Section 2. Where review may be granted as set forth in 28 USC Section 2357 1).

Dated: May 30, 1980.

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT FROM FINAL JUDGMENT, Received on 6-3-80 at State Court of Appeals, Albany, New York.

Respectfully,

s/ JOHN L. GRADY FATIMA GRADY

John L. Grady & Fatima Grady
Appellants
P.O. Box 27 Elmwood Station
Syracuse, New York 13207
458-5500 X3238

c.c. Joseph W. Bellacosa
Clerk of the Court of Appeals
Albany, New York 12207

Martin, Ganotis & Brown
Attorneys for Appellee
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

RECEIVED
JUN 2 - 1980
Office of the Clerk
Supreme Court, U.S.

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980
No. 894/77

JOHN L. GRADY et., and FATIMA GRADY -
APPELLANTS

- v -

RODERICK A. McLEAN, M.D., - APPELLEE

Affidavit of Service

State of New York)
County of Onondaga)
City of Syracuse) SS.:

JOHN L. GRADY, being duly affirm deposes and says:

1. That he is one of the Appellants in the above entitled action, acting pro se at law.

2. That on May 30, 1980, he did serve a Notice of Joint Appeal with proof of service on the Appellee's Attorney, to the New York State Court of Appeals Clerk's office, from a final judgement entered in that office on April 29th, 1980, and a letter requesting that court to prepare the record and transmit it to the Clerk's office of the United States Supreme Court.

3. That also on May 30th, 1980, that he did serve the identical copied papers above named, on Defendant's Attorney Office at 499 South Warren Street, Syracuse, N.Y. 13202, the address given for that purpose. All by Certified mail enclosed in a post-paid enveloped.

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT.

Dated: May 30, 1980.

Respectfully,

s/ JOHN L. GRADY

John L. Grady Appellant Pro se
P. O. Box 27 Elmwood Station
Syracuse, New York 13207
458-5500 3238

Affirmed to Before me this 30th, Day of May, 1980.

s/ RAYMOND P. PROWAK

Raymond P. Prowak, Notary Public in the State of New York, Onondaga County, No. 34-3168015
My Commission Expires March 30, 1981

c. c. Martin, Ganotis & Brown
Attorneys for Appellee
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

ORDER APPEALED FROM, entered 4-29-80.

[Exhibit Page A-3]

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of April A. D. 1980

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

---

4 Mo. No. 456
John L. Grady and Fatima Grady,
Appellants,

vs.

Roderick A. McLean, M. D.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

RECEIVED
MAY 13 1980
COURT OF APPEALS

STATE COURT OF APPEALS – CLERK'S OPINION, dated 5-15-80.

[Exhibit Page A-10]

STATE OF NEW YORK
COURT OF APPEALS

Joseph W. Bellacosa
Clerk of the Court

Clerk's Office
Albany 12207

May 15, 1980

Mr. John L. Grady
P.O. Box 27
Elmwood Station
Syracuse, New York 13207

RE: Grady v. McLean

Dear Mr. Grady:

Section 5514(a) of the CPLR provides an automatic extension of the time within which to take an appeal as of right when a motion for leave to appeal has been denied or dismissed. This presumes, of course, that the order from which the appeal is to be taken is in fact an appealable order within the meaning of CPLR 5601.

CPLR 5514(a) is self-explanatory and self-executing. Your motion for such an extension is therefore a nullity upon which no further action will be taken.

STATE COURT OF APPEALS – CLERK'S OPINION, dated 5-15-80.

Your papers are returned herewith.

Very truly yours,

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa

JG:tab
Enc.
cc: Martin, Ganotis, & Brown, Esqs.

APPEAL BY LEAVE TO COURT OF APPEALS,
dated 4-9-80, entered 4-9-80.

[Exhibit Page A-5]

COURT OF APPEALS
OF THE STATE OF NEW YORK

JOHN L. GRADY and FATIMA GRADY
Plaintiffs-Appellants,

- against -

RODERICK A. McLEAN, M.D.,
Defendant-Respondent.

Notice Of Motion For Leave
To Appeal

Index No. 894/77

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of John L. Grady and Fatima Grady, affirmed to the 9th, day of April, 1980, the reviewable original record, exhibit "AA", on appeal in the Appellate Division, Fourth Department, from the Order and Final Judgement of the Supreme Court, Onondaga County, entered in the office of the Clerk, Onondaga County, on May 22, and 23, 1979, respectfully, dismissing Plaintiffs-Appellant's amended complaint on the merits, the notice of entry thereof, the unanimous order of The Appellate Division, Fourth Department, without opinion, affirming said order and final judgement on the merits respectfully, entered in the office of the Clerk, Onondaga County, the order of affirmance entered on January 1, 1980, in the office of the Clerk, Monroe County, the notice of entry thereof, the order of said Appellate Division, Fourth Department, entered in the office of the Clerk of said Appellate Division, Fourth Department, on March 28, 1980,

APPEAL BY LEAVE TO COURT OF APPEALS,
dated 4-9-80, entered 4-9-80.

denying the motion of Plaintiffs-Appellants for re-argument or, in the alternative, for leave to appeal to the Court of Appeals from said order of unanimous affirmance, the notice of entry thereof and the brief of Plaintiffs-Appellants submitted herewith, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a stated term thereof, appointed to at the Court House of the Court of Appeals in the City of Albany, State of New York thereof, at least 8 days, and not more than 15 days, after notice of motion is served, unless there is no motion day during that period, in which case at the first motion day thereafter as Appellants can be heard, for an order allowing an appeal to be taken herein by Plaintiffs-Appellants in this Court from said order of unanimous affirmance, pursuant to CPLR 5602(a)(1)(i)(ii)(b)(ii), and for such other and further relief in the premises as may be just and proper.

s/ JOHN L. GRADY
John L. Grady

APPEAL BY LEAVE TO COURT OF APPEALS,
dated 4-9-80, entered 4-9-80.

COURT OF APPEALS
OF THE STATE OF NEW YORK

JOHN L. GRADY and FATIMA GRADY
Plaintiffs-Appellants

- against -

RODERICK A. McLEAN, M.D.,
Defendant-Respondent

Affidavit in Support of Motion for Leave To Appeal

State Of New York)
County of Onondaga) SS.:

John L. Grady and Fatima Grady, being duly affirmed, deposes and says:

1. We are the Plaintiffs-Appellants in the above entitled action, and we are familiar with all the facts and circumstances, pleadings and proceedings heretofore had herein.

2. This is a motion, pursuant to CPLR 5602 (a)(1)(i)(ii)(b)(ii), for leave to appeal to the Court of Appeals after refusal of the Appellate Division, Fourth Department, to grant reargument or in the alternative, to grant leave to appeal to the Court of Appeals.

3. This is an action to recover damages caused by Defendant's professional negligence.

4. The Plaintiffs-Appellants pro se, commenced this action on December 14, 1976, and served an amended complaint on January 14, 1977. The Defendant-Respondent moved to dismiss, which was a motion for Summary Judgement was granted by order dated, May 22nd, 1979, and Final Judgement entered on May 23rd, 1979, respectfully. The Plaintiffs-

APPEAL BY LEAVE TO COURT OF APPEALS, dated 4-9-80, entered 4-9-80.

Appellants then appealed from said order and judgement, to the Appellate Division, Fourth Department. By order of the Appellate Division, Fourth Department, dated, and filed January 11, 1980, the order of dismissal at Special Term was unanimously affirmed without opinion. Said order of unanimous affirmance was entered in the office of the Clerk of the County of Monroe on January 11, 1980, and a copy thereof with notice of entry was served on Plaintiffs-Appellants on January 16, 1980. Said order is a final order.

5. By motion returnable before said Appellate Division Fourth Department, on February 4th, 1980, the Plaintiffs-Appellants applied to said Court for an order granting a reargument of the appeal to said Court or, in the alternative, for an order allowing the Plaintiffs-Appellants to appeal to the Court of Appeals from said order of unanimous affirmance and stating that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals. Said motion was in all respects denied by the Appellate Division by order entered in the office of the Clerk of said Court on March 28, 1980, a copy with notice of entry thereof was served upon the attorneys for the Plaintiffs-Appellants on March 28, 1980.

6. Opinion was made by Judge at trial, on 6-27-77, that he had to refer Plaintiff's motion to vacate to Judge who ruled on said order. See exhibits (3) & (4), p. 53 & 54. Judge hearing summary judgement, motion said he saw no basis for vacating his previous order. See exhibit(5) on page 55, and in open Court, this Judge said; "That the part, section two of the original reviewable record would only complicate the appeal." This same Judge said that the doctor found

that there was an infection, and treated it with cauterization. See the Brief and Appendix of Plaintiffs-Appellant's Judge's Decision dated, May 10, 1979, p. A-13.

7. The record of said appeal to said Appellate Division, Fourth Department, its order of unanimous affirmance and its order denying Plaintiffs-Appellant's said motion for reargument, or in the alternative for relief to appeal to this Court, copies of all of which are in the possession of the Plaintiffs-Appellant's, except those left with the Court at pre-trial on 6-6-77, which are requested by Plaintiffs-Appellants to be served on this Court by the lower Court, are hereby made part hereof.

8. It is significant that the Court below, has been silent (mum), concerning the reviewable record/or its review, being Certified by the Clerk of the County Court, Onondaga County.

9. A previous motion has been made in this Court for permission to appeal to the Court of Appeals.

For reasons which appear in the brief hereto attached, deponent respectfully asks that leave to appeal to the Court of Appeals be granted, in accordance

APPEAL BY LEAVE TO COURT OF APPEALS, dated 4-9-80, entered 4-9-80.

with the provisions of CPLR 5602(a), in the interest of substantial justice.

s/JOHN L. GRADY FATIMA GRADY
John L. Grady & Fatima Grady Pro se
Plaintiffs-Appellants

Affirm to Before me this 9th day of
April, 1980

s/MAUREEN A. PECK
Maureen A. Peck
Notary Public in the State of New York
Qualified in Onon. Co. No. (illegible)
My Commission Expires on March 30, 1981.